Sententia non existens – the future of jurisprudence of the Polish Constitutional Tribunal?

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One of the latest topics in the debate on the future of constitutional control in Poland concerns the possibility and the need of common court judges to directly apply the Constitution. This possibility has already existed in theory – according to the Article 8 para 2 of the Constitution of Poland, *the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.* However, in practice, until now in case when the conformity of the normative act with the Constitution was questioned in particular case, the court has always referred the question of law the Constitutional Tribunal (CT). The need to come back to the discussion on direct applicability of the Constitution stems from the questionable legality of some Constitutional Tribunal (CT) rulings in connection with the incorrect appointment of three so-called "quasi-judges" in December 2015

In the near future we can probably expect many examples of CT judgments that shall be questioned both substantially and procedurally. The first of such situations occurred in the case K 2/15 which was brought before the CT by the Polish Commissioner for Human Rights (Ombudsman) in January 2015. Although the final decision deserves to be fully accepted on the merits, its genesis provokes a debate on whether or not it can actually be considered a valid judgment.

The case in question (K 2/15) concerned a single provision of the Foreign Service Act that had failed to include the possibility of reimbursing education fees for children of diplomats in the host country in a specific case. The subject-matter of the case turned out to be uncomplicated, as the other participants in the proceeding (the Sejm and the Prosecutor General) were of the same opinion as the Commissioner. Therefore the CT decided to operate in closed session and not after the public hearing.

From the procedural point of view, however, a problem emerged as two 'quasi-judges' (M. Muszyński and L. Morawski) were selected by the new President of the CT to be among the Tribunal's panel of five judges . To remind the readers: M. Muszyński, L. Morawski and H. Cioch, in the opinion of the Polish Commissioner for Human Rights, cannot be considered constitutional judges. They were irregularly appointed by the Sejm on 2 December 2015, to take the seats of other previously and duly appointed judges. It should be remembered that the inappropriateness of the appointment by the Sejm of those three persons was confirmed on several occasions in the CT's judicial decisions (ruling of 3 December 2015, K 35/15; ruling of 9 March 2016, K 47/15; ruling of 11 August 2016, K 39/16; decision of 7 January 2016, U 8/15). And although they were not allowed by the previous President of the CT – Prof. A. Rzepliński – to participate in judicial panels, in December 2016 his term of office ended and Julia Przyłębska – his replacement – immediately introduced them to the panel.

After the panel's composition was announced, the Commissioner for Human Rights – as the applicant – faced a dilemma as to which course of action to take. The latest Act on the organisation and procedure applicable to proceedings before the CT of 30 November 2016, does not include provisions on the exclusion of someone who actually is not and has never been a Tribunal's judge. The provisions of the act only give a rationale for excluding a duly appointed judge from participation in hearings relating to a specific case. Under these circumstances, having no other option, the Commissioner assumed that one should apply the act's provision which includes a reference to the Code of Civil Procedure, according to which the proceedings should be deemed invalid in case where the panel composition is not consistent with legal regulations. This applies to the case in question as two of the five judges of the panel in the case were appointed in a manner not consistent with the Constitution.

Therefore, the Commissioner for Human Rights submitted a request for the exclusion of M. Muszyński and L.

Morawski from adjudicating in case K 2/15. On 15 February 2017 the CT refused to consent to the Commissioner's request. That decision was delivered to the Commissioner in the afternoon of the day preceding the settlement of the main case, so he had no other remedies at his disposal. It must be clearly stated that this decision on not excluding two persons is dubious, if at all legally binding. First and foremost, H. Cioch, another quasi-judge appointed in the same manner, participated in the decision not to consent to the Commissioner's request. His participation marks a clear violation of the *nemo iudex in causa sua* principle. Furthermore, the panel also included a judge appointed to hear the main case K 2/15 (judge Z. Jędrzejewski), which is unacceptable pursuant to the provisions of the Code of Civil Procedure that should have been applied accordingly in the proceeding before the CT. Up till now it was clear that the judge who is a member of the panel in the main case cannot take part in deciding on procedural problems, such as requests for excluding someone from the panel. This time this rule was breached and Z. Jędrzejewski – constitutional judge assigned to case K 2/15 – decided also on the Commissioner's request.

On 23 February 2017, after a closed-door hearing, the incorrectly appointed members of the panel passed a ruling in the main case in which – not surprisingly taking into account the positions of the participants in the proceeding – it deemed the challenged provisions inconsistent with the Constitution. This could be considered a success of and for the Commissioner, if it weren't to be interpreted as a non-existent ruling. The idea of non-existent rulings is known to the doctrine of civil procedural law and is supported by experts in ths field also to be applied in cases like this, since the Civil Procedure Code should be applied accordingly also in the proceedings before the CT. To say it clearly: not all cases of CT judgment passed by a judicial panel comprising an incorrectly appointed member would have such consequences. But this situation is unique as it demonstrates a far-reaching violation of the rule of law in a democratic country. A decision by judges who are not allowed to adjudicate, as it has been confirmed four times by the CT, can only be regarded null and void.

We shall hope that this time the legislator changes the provision of the challenged act according to the CT judgement of 23 February 2015, although in this case this judgment can be considered non-existent. But let me give you another example of the ruling of the CT from yesterday (16th March 2017, case Kp 1/17) on the law on assemblies in which an incorrectly appointed panel decided that the act was in compliance with the Constitution against the motion of the President of the Republic of Poland and many other experts' opinions. In that case, the issue will have to be resolved by common or administrative courts which will have to assess on individual basis if they share the view that such a judgment, issued by the CT panel including "quasi-judges" should be considered non-existent. This, in turn, would mean the transition from centralised model of constitutional control to a system of dispersed control over compliance with the Constitution in Poland. The presented case clearly illustrates how complex the legal situation has become after the improper appointment of judges in December 2015.

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